Supreme Court of the United States,

OCTOBER TERM, 1901.

FERDINAND N. SHURTLEFF, Appellant, vs. THE UNITED STATES.	No. 289.

APPELLANT'S BRIEF.

Statement.

This is an appeal from the judgment and decree of the Court of Claims dismissing the claimant's petition (Rec. 12, fol. 17) which was filed Nov. 6, 1899 *(Id. 1)* to obtain $3224.29, his salary as a General Appraiser of Merchandise from May 15 to Nov. 1st, 1899, upon the following facts.—

The claimant having been duly nominated, appointed, commissioned and qualified as such general appraiser under Act of June 10, 1890, ch. 407, § 12 (26 Stats. 136; see *infra*, pp. 3, 4) entered upon the duties of that office August 1st, 1890, and thereafter continued in their uninterrupted discharge up to May 15th, 1899, and was paid the salary attaching to that office to that date, but has been paid none since, though always ready and willing and offering to discharge the duties of his said office, which he never resigned nor acquiesced in any attempted removal therefrom, but has

always claimed and still claims said office with its salary, having been engaged in no other business since Aug. 1st, 1890, hitherto. (Rec. 7, 8; fols. 13, 14; Court's findings, I, II, IV, VI to IX inclusive.)

Finding V is;—

"The claimant has never been notified or informed of any charges made against him, either of inefficiency, neglect of duty, or malfeasance in office; and knows of no cause for his removal from said office having been ascertained or assigned by the President of the United States." *(Id.* 8, fol. 14.*)*

The Secretary of the Treasury, January 17, 1899, addressed to claimant a letter which omitting date, signature and formal parts, is as follows;—

"SIR, The President deems it his duty to make some changes in the personnel of the Board of General Appraisers. With this in view, he directs me to request you to send to him your resignation, to take effect at his pleasure." *(Id.* 7, fol. 13, Finding III.*)*

With this request the claimant declined to comply, and demanded to be furnished with a copy of any charges preferred against him, and that he be given an opportunity to be heard in his own defense. *(Ibid.)* Thereafter he continued to perform the duties of his office, and on May 3d, 1899, the President wrote him (omitting dating, signature and formal parts) thus;—

"SIR: You are hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor." *(Ibid.)*

The day before that of this attempted removal, the president had assumed to appoint another person in Mr. Shurtleff's place, and that person assumed to take the oath and discharge the duties of the office; and at the next session of the Senate his nomination was confirmed, and he has since continued to perform the duties of an appraiser. *(Id.* 8, 9; fol. 14.*)*

The following is the Court's last finding:—

XI.

If the claimant is entitled to recover on the foregoing facts, the amount due is $3,224.29. *(Id.* 9, fol. 14.*)*

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition is therefore dismissed. *(Ib.)*

Assignment of errors.

The appellant assigns for error:

(1.) That the 'conclusion of law' is antagonistic to the facts found from the evidence; and does not give to those facts their true legal effect, but the contrary effect.

(2.) There is error in the conclusion of law, in this;—that it decides "that the claimant is not entitled to recover, and his petition is therefore dismissed" (Rec. 9, fol. 14); whereas the true legal conclusion should have been that he was entitled to recover the sum of $3,224.29 *(Ib.)*

(3.) The judgment and decree of the Court of Claims, finding for the defendant, and decreeing that claimant's petition be dismissed, is erroneous upon the facts found, which required a judgment in his favor for $3,224.29 (Rec. 12; fol. 17.)

Statutory provisions.

The twelfth section of the act of June 10, 1890, ch. 407, commences;

"That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise, each of whom shall receive a salary of $7000 a year. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in

any other business, avocation or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty or malfeasance in office" (26 Stats. 136.)

This is all of that act relating to the power of appointment, or of removal.

BRIEF OF ARGUMENT.

I.

Preliminary.

The essential facts of this case, nearly all being matters of public record, are undisputed. The only controversy is as to their legal effect.

This may involve a constitutional question and also one of statutory construction:—FIRST, does the act of June 10, 1890, § 12 (26 Stats. 136; see *supra*) undertake to limit the presidential power of removal? and, SECONDLY, if it does, is it competent for Congress to prescribe any such limitation?

Since this cause was decided by the Court of Claims, this Court has answered both of these questions affirmatively. Had its Opinion in the Reagan case, decided May 27, 1901 (182 U. S. 419, 425) been promulgated prior to January 28th, 1901 (Rec. fol. 17) the judgment of that date from which we appeal never would have been entered; but a contrary one, for the sum claimed by appellant, conformably to the brief, able Opinion of HOWRY, J., dissenting below. (*Id.* 11, 12; fol. 16.) While every Opinion must stand upon the force of its own reasoning (which that of Judge HOWRY certainly can) it is only just to him to mention that he was not the sole dissentient from a full bench, but that illness prevented the attendance of the Chief-Justice and of Judge DAVIS at the hearing of this cause.

Upon the twenty-seventh of May last this Court said through its Chief-Justice :—

" The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of removal. *If there were*, then *the rule would apply that where causes of removal are specified by the constitution* OR STATUTE, as also where the term of office is for a fixed period, NOTICE AND HEARING ARE ESSENTIAL. If there were *not* [constitutional or statutory causes prescribed] the appointing power could remove at pleasure, or for such cause as it deemed sufficient."

Reagan v. U. S. 182 U. S. 425.

The Statute *(ante,* pp. 3, 4*)* under which Mr. Shurtleff was appointed did specify three causes of removal (26 Stats. 136) ; and he never was notified, nor had any reason to suppose, that he was charged in respect to either of them, nor had he any hearing. (Record, 8, fol. 14 middle ; finding V.) Indeed, *a different reason was assigned* by the Secretary of the Treasury. *(Id.* 7, fol. 13 bottom.*)* Hence, it may be considered that the decision above quoted is an end of controversy, and should foreclose further discussion ; but this will be proceeded with, to show that no facts peculiar to this cause preclude the application to it of the above-stated ' rule.'

While the general line of argument and authorities followed in the Court of Claims will be pursued here (though not strictly) there are other similar decisions by State Courts to be cited rendered since this case was submitted below, touching some of its incidents.

Yet " 'tis sixty years since " that the Hennen case (13 Pet. 259) determined this question, as assumed in Judge HOWRY'S opinion (Rec. 11, fol. 16) confirmed by this Court in the case cited, 182 U. S., 425. HOWRY, J. *(ubi sup.)* thus italicizes :—

That it is competent for Congress to limit the Presidential power of removal seems well enough settled to assume such right. The power of removal as incident to the power of appointment is considered by the Su-

preme Court to be a sound and necessary rule, in the absence of all constitutional provision *or statutory regulation.* (*In re Hennen*, 13 Pet., 229.)

II.

The power of removal.

The constitution makes no mention of *removals* from office. The exercise of that power is left to implication; and has generally been held to be inferred from the power to appoint; and from the nature of and the limitations upon that power as indicated in the law establishing the office. "The Congress", which consists of a Senate and a House of Representatives, may determine what inferior officers shall have their appointment vested in the President, a Court, or head of a department. The President can fill only temporarily those vacancies which "may happen during the recess of the Senate."

What is the correct inference as to the power of removal, as to these offices concerning which no statute said anything upon this point, has been a subject of debate from the commencement of the government. It has received no legislative determination prior to the passage of the "tenure-of-office" act of March 2, 1867.

The general question had never been settled by any judicial decision other than Marbury v. Madison, 1 Cr. 162, and Hennen's case, prior to Reagan's (182 U. S. 425); the earlier decided cases being confined to the particular statutes upon the construction of which their result depended. The issue has been whether Congress *intended* to restrain, or limit, the executive's power of removal; not whether it is competent for Congress to impose such restraint, or limi-

tation. The general, practically universal, tenor of judicial opinions is that this can be done.

Upon the generally accepted principle, that a power to appoint—*under statutes silent as to removals*—implies a right in the appointing power to remove, Alexander Hamilton apparently considered the question too clear for discussion that "The consent of that body (Senate) would be necessary to displace, as well as to appoint". (Federalist, No. 77.)

In the debates in 1867, such was said to have been Madison's original opinion.

At all events, it was the only avowed construction, at the time of the adoption of the constitution, of which we find any record. Field v. Peo. 3 Ills. 79.

The debate and vote upon the act of July 27, 1789, ch. 4 (1 Stats. 28) has been referred to as a legislative determination that the President has a constitutional power to remove which cannot be affected by legislation. That it can have no such binding effect is obvious. But an examination further shows that the original bill was so changed, by a compromise amendment, as to combine in favor of its passage those who believed in the president's untrammeled right to remove with those who, not entertaining this belief, were willing to have that right exercised by our first president, through the unbounded confidence reposed in him.

The Hamiltonian construction was considered the true one by Kent, Story and Webster. The latter only yielded to precedent, in his *senatorial* capacity, while avowing that precedent to be wrong in principle, barely established through the confidence felt in President Washington, upon Mr. Madison's theory of necessity, in extreme cases of insanity, defalcation, etc. (1 Webst. Wks. 258–9; 2 *Id.* 89). Emphasizing the point that the presidential power of removal rested upon no ground "except precedent, and precedent alone", Mr. Webster continued; "No such power is given by the Constitution in terms; nor anywhere intimated

throughout the whole of it. No paragraph or clause of that instrument recognizes such a power"; which, he adds, is "questionable" and "often questioned". (3 *Ibid.* 432.)

In a later speech, reiterating the same idea, Mr. W. observes;—"There is certainly no specific grant. It is a power, therefore, the existence of which, if proved at all, is to be proved by inference and argument." (4 *Ibid.* 185.)

Mr. Webster was defining his position as senator;—not laying down the principle he thought should guide judicial action. In the Senate, upon the nomination of persons to replace those removed by the President, he would abide by the rule so adopted in 1789.

That the inference was neither an obvious nor necessary one is demonstrated by the narrow majority by which it was adopted, in favor of George Washington; the casting vote of Mr. Adams being thrown by one acting under the influence of his executive position, and the expectation of succeeding to that which he did attain, where he could exercise this power, and is further shown by the consensus of opinion, and force of argument, upon the abstract question, of a large majority of our statesmen and legal authorities since 1789.

At the time Mr. Adams gave the casting vote, civil-service abuses and reforms were unknown; "the judicial opinion and the public sense were not so much awaked to the importance of the principle underlying this matter then as now." Gross v. Rice, 71 Me. 251.

Of all those conspicuous in our revolutionary struggle, the last whom the framers and adopters of the Constitution would have been willing to entrust with authority to finally determine the extent and limitations of executive power would have been John Adams; who was chosen Vice President by the vote of less than half the electors.

Chancellor KENT considered it "a striking fact" that, in the absence of judicial discussion, "the construction given to the Constitution in 1789 has contin-

ued to rest on this loose, incidental, declaratory opinion of Congress," and subsequent practice. (1 Kent, Com. *310.)

III.

Removal of "Inferior Officers."

It must be borne in mind that the resolution of 1789, and the debate thereon, and all subsequent discussion, has been concerning officers which have been considered not "inferior," or not within the act of 1867 (Johnson Impeachment, *passim*), or else those upon whose removal by the President Congress has not sought to place any limitation or restraint.

This distinction has always been observed, and there has been no intimation from the bench or authoritative constitutional commentators (like Story) that Congress cannot restrict removals from such inferior offices as it may establish. The contrary has been repeatedly and uniformly declared prior to the last term of this Court and the decision in Reagan's case.

In that of Hennen, the Supreme Court said it was "In the absence of all constitutional provision, or *statutory regulation*," a sound and necessary rule to consider the power of removal as incident to the power of appointment. (13 Pet. 259.) Marbury v. Madison, 1 Cr. 162. U. S. v. Guthrie, 17 How. 306.

At this page (306) Mr. Justice McLean states that the opinion there expressed by him was that of the late Chief-Justice Marshall, and of the Court over which he presided.

The power of appointment to office is not, *per se* and necessarily, an executive function; certainly not where, as under the federal constitution, it may be exercised (as to inferior officers) by a head of a de-

partment, or a court, as Congress may prescribe. Therefore, those who control the right of appointment to an office may declare its terms and tenure. This has been many times decided in states whose constitutions, in this respect, were like that of the United States.

Fox v. McDonald, 101 Ala. 72, 74.
Peo. v. Morgan, 90 Ills. 562.
Mayor v. State, 15 Md. 455.
Peo. v. Freeman, 80 Cal. 233.
Peo. v. Hurlbut, 24 Mich. 63.
Peo. v. Woodruff, 32 N. Y. 364.
St. v. Constantine, 42 Oh. 441.

Our position is stated in this language of the Supreme Court of Indiana ;—

" Whenever the subject has been considered with a view to its practical application to cases in hand, it has been held that the executive has no power of appointment to public office beyond such as is expressly conferred by the Constitution and the laws enacted in obedience thereto ; and that the Constitution and the laws which confer the power measure the extent of executive authority in that respect." (119 Ind. 403).

That is, where the Constitution confers the power, it imposes the only limitations of it ; where it is only derived from a law establishing the office, that law may prescribe the requirement for the appointment ; and, necessarily, the conditions for removal from the office.

Hovey v. State, 119 Ind. 403.
Collins v. St. 8 *Id.* 344.
State v. Swift, 11 Nev. 137-8.
Field v. People, 3 Ills. 79.

78 N.Y. 361
167 " 296, 299.

Touching the *power* of Congress to regulate the tenure of the offices they create, Judge STORY observes ;—

" As, however, the tenure of office, of no officers (except those in the judicial department) is, by the Constitution provided to be during good behavior, it follows, by irresistible inference, that all others must hold their offices during pleasure, *unless congress shall have given some other duration to the office.* As far as

"The distinction [between constitutional and statutory offices] is one that has been frequently recognized by the Courts which hold . . . that an office created by statute is wholly within the control of the legislature, which may restrict its tenure", etc.; said to be "well settled" in nearly all the states of the Union. Ward v. Scheu, 60 App. Div. 594-5, citing 155 N. Y. 270; 148 Id. 677; 156 Id. 580; Same case, 21 Misc. R. 605 and 27 Ap. Div. 387.

The legislature "can do what it thinks best with a public office, or public officer". "All statutory offices are taken subject to legislative action." Mitchell v. Sturges, 21 Misc. 607.

Congress constitutionally possess the power to regulate and delegate the appointment of inferior officers, so far they may prescribe *the term of office*, the *manner in which*, and the persons by whom, *the removal*, as well as the appointment to office *shall be made.*" 2 Story, Const. § 1537.

He proceeds to the inquiry "to whom, *in the absence of all such legislation*, does the power of removal belong? *(Ibid.)*

A second question was, whether Congress could limit the duration of offices, appointment to which was given by the Constitution to the President. *(Ibid.)* There was no question suggested as to the right of Congress to control and regulate the duration of, and cause and mode of removal from, an office which was of legislative creation.

Long v. Mayor, 81 N. Y. 425.
Taft v. Adams, 69 Mass. 130.
Peo. v. Osborne, 7 Colo. 608.

The Ohio Court, holding an act conferring a power of removal for misconduct upon the governor not unconstitutional (as delegating *judicial* power to the executive) made these observations;—

"It is also claimed that a distinction should be taken [*i. e.* only as to it being an exercise of judicial power. E. B. S.] between the case where an appointment to an office is made to be held by the appointee at the pleasure of the appointing power, and where it is with a provision for removal for misconduct. [*i. e.*, that the latter involves a judicial question. E. B. S.] But there is none in principle, so far as the right to remove is concerned. The office, in either case, is held *subject to the terms upon which it was created*, and *the mode of removal prescribed.* As it may be so created as that the incumbent shall hold at the pleasure of the appointing power, then, for a stronger reason, *the appointment may be made to depend upon a removal for cause, irrespective of where the power to remove may be lodged.* The manner of filling and vacating the office being unaffected by constitutional provisions, the manner presented by the legislature must prevail in either case. It is a strange sort of logic which reaches the

result that the office may be accepted in the manner prescribed by the legislature, and the mode of removal rejected.

3. The next question is as to whether the exercise of the power can be reviewed in this Court. . . . . The only question which this Court can consider is, *whether charges involving official misconduct were preferred, of which the parties had notice, and that he acted upon those charges,* and removed the respondents *for the reasons stated in the charges.* The law as to this question is, as we think, accurately stated by DIXON, C. J., in State v. McGarry;—' *The cause must be one which touches the qualifications of the officer for the office,* and shows that *he* is not a fit or proper person to perform the duties; and when such a cause is *assigned* [ital. in original] the power to determine whether it exists or not is vested exclusively in the board, and its decision upon the facts cannot be reviewed by the Courts.' "

State v. Hawkins, 44 Oh. St. 114–5.
State v. McGarry, 21 Wis. *498.

The sentence of Chief-Justice DIXON'S opinion immediately preceding that above-quoted, by the Ohio Court, reads;—

" If the board should attempt to remove him for some cause not affecting his competency or fitness to discharge the duties of his office, that would be an excess of power, and *not a removal within the statute. It would be equivalent to removing him without assigning any cause*—a merely arbitrary removal, which the statute does not authorize." (21 Wis. *498.)

St. v. Kuehn, 34 *Id.*, 233 bot.

The sentence of the opinion of the Ohio Court next preceding what we have above quoted therefrom is;—

" Whether the person removed was, or was not, appointed to his office by the official that is vested with the power to remove, cannot, as we see, change the essential character of the power of removal."

St. v. Hawkins, 44 Oh. St. 144.

The Ohio Statute (Laws, 1885, p. 102, § 1872) contained this provision, under which the governor acted,

and touching which the language above quoted was used ;—

" And for official misconduct any commissioner may be removed by the governor." In the Ohio Rev. Stats., ed. of 1896, this sentence is found in section 1870.

No, ' hearing ' is expressly required ; yet the court consider that one should be given. As matter of fact, Gov. Foraker did notify the Cincinnati commissioners of the charges filed and set a day for them to be heard, if they desired, but they rested on their written answers. The governor stated in writing the grounds of his findings of misconduct and of removal; which became part of the records of executive action *(Ibid.)*

Dullam v. Wilson, 53 Mich. 392.
Newsom v. Cocke, 44 Miss. 358–9.

In this Mississippi case, the Court say :—

" It was well settled that, prior to the tenure of office act, where no tenure of office was prescribed by the Constitution or *laws* of the United States, it was held at the pleasure of the appointing power; that the President, anterior to that act, possessed the power of removing all officers, civil and *military* except those in the judicial department, *or where Congress has given some other duration to the office.*" Then follows a quotation to this effect from the Hennen case, 13 Pet. *259 ; after which the court proceeds to state that controversy had arisen over the question whether the President alone could remove an officer appointed with the consent of the Senate, " where the tenure was not fixed by the Constitution *or an act of Congress.*" (44 Miss. 358–9.)

' Tenure ' means the other terms, manner, and conditions of holding an office, as well as the calendar-time prescribed to it.

U. S. v. Hartwell, 6 Wall. 393.
Peo. v. Waite, 9 Wend., 58.
Ex. p. Herrick, 78 Ky., 32.

The exception made by the Mississippi court in the foregoing quotation as to tenures civil or *military*,

prescribed by law, turns our attention toward the subject of army appointments, standing upon the same footing as civil. Section twelve of the act of 1865 (13 Stats. 489 top) was drafted by Mr. Garfield, who expressed his regret, two years later, that he had not drawn a bill for a like Court of Inquiry upon removals from civil office ; which he would have done had he not been informed that one was being prepared by Mr. Jenckes of R. I. " to regulate the tenure of office in the civil service." (Cong. Globe, 39th Cong. 2d. Sess. pp. 24 and 71.)

He considered the right so to legislate to be as unquestionable with regard to civil as to military officers ; nor can any sound distinction be made.

The section (12) to which we refer allows any officer of the army or navy, " dismissed by authority of the President," to make a sworn application for a trial, setting forth that he has been wrongfully dismissed, whereupon the President shalt convene a court-martial to hear and try the charges upon which the dismissal was made. If, upon the trial, the court-martial do not award death or dismissal—or in case no such court is convened within six months—" the sentence of dismissal shall be void " (13 Stats. 489 top.) This provision, made law, in time of war, by the approval of Abraham Lincoln, at the close of his first term of service, was incorporated into the Revised Statutes as Sec. 1230, in *hæc verba*.

The amendatory act of June 22, 1874 (18 Stats. 192, top § 2) provides that an officer neglecting to file his application for six months shall not receive more than six months' leave-pay during the time elapsing prior to his restoration.

This section, drafted by Mr. Garfield, approved by Mr. Lincoln, and amendments adding further restrictions approved by Pres. Grant, have remained law to this day.

McElrath, 12 Ct. Clms. 215 ; 102 U. S. 437.
Embry, 12 *Ibid.* 455 ; 100 *Id.* 680.

Blake, 14 *Id.* 462; 103 *Id.* 235.
Corson, 17 *Id.* 344; 114 *Id.* 619.
Perkins, 20 *Id.* 438; 116 *Id.* 483.
Keim, 33 *Id.* 174; 177 *Id.*

The case last-above cited relates to the removal of an officer by the head of a department upon whom the statute had conferred the power of appointment and of removal; and does not arise under Secs. 1229, 1230. In the Perkins case, which did involve the construction of R. S. Sec. 1229, the Supreme Court adopted as its own the opinion of the Court of Claims; to the effect that

"When Congress by law vests the appointment of inferior officers in the heads of departments it may limit, and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." U. S. v. Perkins, 116 U. S. 485, top.

It cannot affect the soundness of the reasoning upon which this Perkins case was decided, nor its applicability, that in the cause at bar Congress exercised its option, and "constitutional authority" to vest the appointment of the General Appraisers of Merchandise authorized by the Act of June 10, 1890, in the President (with the concurrence of the Senate) instead of in the Secretary of the Treasury, or in this Court. The office thus created was not constitutional, but statutory, in that it was 'inferior', and was "established by law", without specification of it in the Constitution. (1 Cranch, 167.)

Having the power to confer the right of nomination upon the President, or head of a department, or a Court, or to leave it to the President subject to the Senate's approval, the correlative power existed to restrict the original selection, or limit the power of removal. Determining where these powers shall be

lodged has naught to do with the restrictions to be placed upon their exercise.

Marbury v. Madison, 1 Cr. 167, quoted *infra*, p. 27.

The power of appointment, and of removal, has repeatedly been limited; whether appertaining to the President, or to the head of a department.

As it must have received the approbation of the eminent Secretary of the Treasury who afterward became Chief Justice of the United States, we first refer to the Currency Act of Feb. 25, 1863, the first section of which directed that the Comptroller of the Currency "shall be appointed by the President, on the nomination of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President by and with the advice and consent of the Senate"; and the Secretary is empowered to appoint the deputy-comptroller and all necessary clerks. (12 Stats. 665–6.)

The act of August 3, 1861, § 8, limited the right "to appoint to *any* place in the army" a cadet who had been recommended to be discharged from the military academy. (12 Stats. 288.)

The act of July 16, 1862, § 11, confers upon the President the right to appoint three midshipmen yearly, but the selection must be confined to boys not over eighteen, who have enlisted in the navy, served one year, and seen six months sea-service. (12 Stats. 585.)

The act of July 17, 1862, § 17, authorized and requested the President to dismiss any officer of the army or navy "for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismissal would promote, the public service." (*Id.* 596.)

It was this general, absolute power of removal which

was restrained by the previously-mentioned twelfth section of the act of March 3, 1865, drafted by Mr. Garfield ; probably for reasons made known to him by his own military experience. (13 Stats. 489, top.)

The twenty first section of this act rendered all deserters, and all enrolled men who went out of the jurisdiction to avoid a draft, "forever incapable of holding any office of profit or trust under the United States" *(Ibid. 490)*; creating a large class out of which the President could not make, nor the Senate consent to, an appointment. This indicates the right to impose some restrictions by legislation.

The act of July 28, 1866, § 28, declares "illegal and void" the appointment to any position in the army of any person who had been in the service, civil, naval, or military of the confederate states, or of any state in insurrection. (14 Stats. 337.)

The act of July 15, 1870, § 17, authorized the dropping from the rolls of any officer absent from duty for three months without leave; and any officer so dropped "shall not be eligible for re-appointment." (17 Stats. 319.)

If the power to appoint, *in the absence of statutory restriction*, implies the power to remove (13 Pet. 259) then, by parity of reasoning, the legislative power to limit appointments—excluding, for stated causes, thousands of men from the right to be designated to office—implies the right of Congress to limit the right of removal to specified grounds.

Even the 'moral restraint' which Mr. Evarts said (see quotation in Parsons v. U. S. 167 U. S. 331) Mr. Webster wished to place upon the President, by requiring him "to assign the reason of the removal", concedes our position ; for if any 'restraint' is permissible to Congress, it must judge of the degree and character of restraint that should be imposed. If the President's mere will and pleasure are not to stand as the all-sufficient reason for his act of removal—if he can be statutorily required to render an account of his reasons

—he can be thus required to find and assign such reasons when, or before, he attempts to remove an officer; and prohibited from removing, except for a specified and ascertained cause.

As we have seen, in the second year of the Civil War the President was authorized, by act of July 17, 1862, to remove any army and navy officer for any cause that seemed to him good. This was made subject to revision by the act of March 3, 1865, § 12; and by act of July 13, 1866, § 5, it was enacted that "no officer in the military or naval service shall, in time of peace be dismissed from service except upon, and in pursuance of the sentence of a Court-Martial, etc." (14 Stats. 92; now R. S. sec. 1229.)

McElrath v. U. S. 102 *Id.* 438.
Blake v. U. S. 103 *Id.* 235–6.

The construction given to Rev. Stats., § 1229, in Blake's case, was that Congress did not intend to prevent removals made with the consent of the Senate; but only to prohibit removals by the President alone, except after sentence of a court-martial. *(Ibid.)*

Keyes v. U. S. 109 *Id.* 339.

This cannot affect the present question. That Congress could prescribe *some* conditions upon the exercise of the power of removal is a concession that it may determine the character and extent of those conditions, touching its establishment of an inferior office; as to which it may place the power of appointment and removal in either of the constitutionally-mentioned depositaries of that power.

It makes no difference that these cited statutes, prior to the tenure-of-office act of 1867, relate to military appointments; for, as in accordance with the opinion of Attorney-General Cushing, quoted in Parsons v. U. S. 167 U. S. 334, it is clear there is

"not any ground of distinction in this respect so far as regards the strict question of law between officers of the army and navy and any other officers of the govern-

ment. As a general rule, with the exception of judicial commissions, they all hold their offices by the same tenure in this respect." (6 Atty. Gen. Ops. 5, 6; 12 *Id.* 425–6.)

Another opinion affirms the constitutionality of the twelfth section of the Act of March 3, 1865, stating contingencies which render a dismissal by the President void. (12 *Id.* 4.)

Power to prescribe that certain contingencies shall nullify a removal by the President is a power to declare what contingencies shall have this effect.

Attorney-General Cushing's opinion states an incontrovertible position.

The implication from congressional authority "to make rules" for the army and navy is certainly no stronger than from its power to establish all inferior offices and determine where the right of appointment thereto shall vest, as Congress may deem most for "the general welfare."

Except the provisions for judicial independence, there was no intention to permit the creation of any offices which should be above, or beyond the control of, the sovereignty represented by the Congress of the United States, legislating upon the subject; in respect to their tenures and duties.

Parsons' case does not (any more than the others above cited) question this right; only considers the manner of its exercise; examining statutes, decisions, etc., as a means of ascertaining "the true construction of the language used by Congress in the section of the Revised Statutes under examination". 167 U. S. 335 top.

The conclusion was that R. S., sec. 769, was *not* intended to limit the power of removal; no such conclusion is possible with reference to the language of the twelfth section of the act of June 10, 1890; considering the object of that novel legislation; its requirements as to appointees; the nature of the duties to be performed; the necessity that these should be discharged

without fear of executive displeasure, or of arbitary removal, or any seeking of executive favor;—it is impossible to deny that the restraint was intended to be placed upon the power of removal.

The course of legislative, administrative and judicial action—as well as the text of the Constitution—support Judge CADWALADER's statement, viz.;

"Until the acts of 1866–7, which have been mentioned, the power of Congress to define tenures of office in such a manner as to prevent removals at the mere will of the President had scarcely ever been exercised; though *the legislative power to do so*, as to all offices whose tenure is not constitutionally defined, *was never doubtful*".

Dist. Atty., 7 Fed. Cases, 737; and 7 Am. L. Reg. (N. S.) 786.

IV.

Tenure-of-office act.

As the act of March 2, 1867, ch. 154 (14 Sts. 430) generally known by the above title, is the most signal instance of congressional control over removals from office, we call attention to it in a separate division of this brief, although this is but a continuance of the discussion of the preceding division.

It is not imputable, as discrediting this law, that it was enacted under the stress of a supposed imminent necessity, arising from peculiar circumstances. This is largely true of all legislation. No statute would be passed to define and punish embezzlement until somebody was unfaithful to his trust; nor against "trusts", until such combinations were entered into, and deemed prejudicial to the general welfare.

Nor can the intent or constitutionality of any statute be judicially ascertained, until some individual litigant claims to be protected or prejudiced by its terms; as Mr. Evarts most forcibly stated at the commencement of his argument in behalf of Pres. Johnson;

"Constitutions are framed; laws established; institutions built up; the processes of society go on until at length by some opposing, some competing, some contending forces in the State, an individual is brought into the point of collision, and the clouds surcharged with the great forces of the public welfare burst over his head." (2 Impeachm. Trial, 269.)

Hence, as Judge CADWALLADER observed;

"The omission to litigate the question before the act of 1867, therefore, warrants no just inference of acquiescence in the alleged administrative usage. Even under this act, judicial contestation may not readily occur." (7 Fed. Cas. 737.)

This act of 1867 was not hasty legislation. A similar bill was debated at a previous session, and this which was enacted into a law was fully discussed in both houses, and in conference. It passed the Senate by 35 yeas to 11 nays; the House, 133 to 37. Some (many, no doubt) of the nays might have been cast merely on the question of expediency; every affirmative voter must have considered the law constitutional. Among the yeas were Senators Edmunds, Fessenden, Frelinghuysen, Grimes, Ira Harris, Henderson, Howe, Howard, Poland, Sherman, Sumner, Trumbull and George H. Williams; in the House, Conkling, Garfield, James F. Wilson, and many other good lawyers. Three of these eminent senators voted against the impeachment of Andrew Johnson, upon the ground that the proviso to the first section took cabinet officers out of the other provisions of the law.

Of those, who approved this bill, Messrs. Conkling, Williams and Howe were tendered, by the next President, seats upon the bench of the Supreme Court; the

latter not being nominated for Chief-Justice only because he thought political obligations hindered his vacating his seat in the Senate. No better constitutional lawyers than these, with Edmunds, Fessenden, and those above enumerated, sat in the Congress of 1789, or in any other, before or since that year.

If this act did not accord with what Kent calls the " loose, incidental, declaratory opinion " of the Congress of 1789, the weight of authority and 'precedent' would be in favor of the latter view; but the compromise language of the act of 1789 only recognized the president's right to remove " in the *absence* of statutory regulations ". (13 Pet. 259.)

In his note to the twelfth edition of 1 Kent's Com., at page *310, Mr. O. W. Holmes—long Judge, and now Chief-Justice of the Mass. Supreme Court—referring to this act of 1867, " considers it settled . . . . that it was within the constitutional power of the legislature to pass " these acts. Field v. Peo. 3 Ills. 79.

Senator Howe said it was conceded by a great majority in both houses, at that and the prior session, that the power of removal vested in the president " *by reason of statutory enactments*, and not by virtue of the constitution." Cong. Globe, 2d Sess. 39th Cong. p. 1517, Feb. 18, 1867.

Upon the first consideration of the bill, Senator Edmunds said;—

" The Committee have recommended the adoption of this rule respecting the tenure of officers as a permanent and systematic and, as they believe, an appropriate regulation of the government for all administrations and all time." *(Id.* p. 382.*)*

To like effect was the language of the member of the House reporting it for his committee, Mr. Thomas Williams of Pennsylvania. *(Id.* p. 17.*)*

The McAllister case holds a territorial judge removable by the President " in the manner and *upon the conditions* " set forth in R. S., sec. 1768; which section is a reproduction from this Act of 1867. The reason

assigned is that such judge is a statutory, not a constitutional, officer. McAllister v. U. S. 141 U. S. 175.

The Courts of states whose Constitutions read substantially like that of the United States in this matter of appointments to office have made decisions sustaining the legislative right to control removals, and permitting only removals for cause ;—as will be shown in the next division of this brief.

V.

Act of 1890 limits power of removal.

That Congress intended to protect the General Appraisers of Merchandise, to be appointed under the act of June 10, 1890, from removal without reason, or for reasons not arising out of individual incompetency or misconduct, is evident from the reading of this statute.

When this bill was reported from the Committee of Ways and Means, Mr. McKinley, its chairman stated the effect of its several provisions. The only explanation made by him touching this twelfth section was that it substituted nine General Appraisers for the four previously existing. The only amendment in the Senate was to increase the salary to be paid them. Otherwise, this section passed unchallenged in either house ; yet its provisions must have been scrutinized in the committees of each house ; and it was enacted to have just that effect which the natural, ordinary meaning of its language imports.

The whole scheme, and unusual requirements, in regard to these appointments could not escape attention. They were to be bi-partisan, to secure the proper discharge of duties quasi judicial, to which the appointees were to devote their entire time and attention ; and if they did this honestly and efficiently they were to be,

and feel, safe in the impartial performance of their functions.

They "may be removed from office at any time by the President for (1) inefficiency (2) neglect of duty or (3) malfeasance in office"; if neither inefficient, neglectful, nor guilty of misdoing in office, they were not to be removed by the President at any time. *Expressio unius*, etc.

Peo. v. Commrs. 106 N. Y. 68
Biggs v. McBride, 17 Or. 651.

That is, there was to be no removal, by any power—the President alone, or with the concurrence of the Senate—except for cause; upon one or the other of the *specified* grounds.

The reason of this restriction lies upon the surface; the judicial nature of the office. The subjects of consideration arising out of a revenue system which had long been a topic of political debate, this section forbids that more than a bare majority of the General Appraisers shall be appointed from the same party. It attaches an honorable salary, that these officers may be independent, and confines their activities to their official functions, which embrace as arduous a field of labor as any ever assigned to any tribunal. They have to ascertain the foreign market-value, and the correct tariff classification of thousands of millions of dollars' worth of importations annually, the duties collected thereon averaging over a million dollars a day. This they do upon evidence, documentary and oral, presented and controverted by deeply-concerned conflicting interests, so as to do justice to the taxpayer and to the government, in construing voluminous and often antagonistic provisions and decisions.

This litigation demands all the more careful attention, and judicial independence, because it is between the government and the citizen; in which it is scarcely more necessary that justice shall be administered impartially than that it shall be seen to be so administered,

without either the interposition of executive power, or the apprehension of executive displeasure.

Independency is of equal importance to every officer exercising judicial functions, whether under constitutional or statutory provisions; the reasons, STORY observes (Const. §§ 1610, 1614, 1619 and 1620) applying " with augumented force to republics," under a written constitution. Thongh this Board, having power to compel the production of papers and the appearance of witnesses liable to the pains and penalties of perjury (§§ 16 and 17) may not be a Court technically, yet (if so) Congress saw that the duties to be performed, required for their proper discharge, the same security of independence which attaches to the federal judiciary, to whom this protection is guaranteed by constitutional provision; as it would be to these appraisers had they been constituted a court by name as well as function. But this would have required resort to cumbrous proceedings of impeachment to effect a removal. Congress designed to secure independence by statutory provision, permitting retirement by simpler means than impeachment of an official *found* incompetent or unworthy. No other reason can be assigned for making the tenure substantially that of good behavior, attaching conditions to the power of removal.

" It seems like the substitution of the Court [President] for the legislature when acting by impeachment or address, as provided in the second section of the Constitution." State v. Leach, 60 Me. 67.

At and before the time Congress employed this language of sec. 12 of the Administrative Act, it had received a construction by the general consensus of legal opinion and judicial decision, formulated into " the rule " mentioned in Reagan's case, 182 U. S. 425. It was adopted with the expectation that it would be taken in this accepted meaning. In effect, it required the formulation of charges, and an investigation of

them, as a condition precedent to any removal from the office created by that section. *(Ibid.)*

See these authorities, published in 1890-1892.

Mechem, Pub. Off. § 454 ; Throop, do., § 364 ; 25 Am. L. R. 212.
Board v. Darrow, 13 Col. 460.
Com. v. Slifer, 23 Pa. St. 23 ; 32 *Id.* 478.
Clark v. Cape May, 50 N. J. L. 558.
St. v. Police, 14 Mo. Ap. 305 ; 88 Mo. 144.

When the tenure of office sections of the Revised Statutes were repealed (but not retroactively) by the act of March 3, 1887 (24 Stats. 500) section 1767 was repealed; leaving the tenure of offices thereafter created to be determined by the acts establishing them.

Peo. v. Freeman, 80 Cal. 233.

This act of June 10, 1890, repealed all acts and parts of acts inconsistent with its provisions. (26 Stats. 142.)

A removal for cause, specified or generally, means that the officer is not removable at the mere will and pleasure of the executive; nor is it material that the Senate subsequently acquiesces, by confirming the appointment of another, if the removal was not for such cause as the law makes the ground of removal. The President and Senate, acting concurrently, are no more above the law than either would be alone.

"The act under which they were appointed provided, that the Governor might remove them for cause. This clearly implied that they could not be removed at the will of the governor, OR *without cause.*" Biggs v. McBride, 17 Oreg. 651.

Assuming as indisputable that, in establishing an office, Congress can limit and prescribe the tenure, including a specification of what grounds only shall authorize removal, the language of the Supreme Court, in the Marbury case, is applicable :—

"When he [Pres.] has made an appointment *he has has exercised his whole power*, and his discretion has been applied to the case. If, by law, the officer be removable at the *will* of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated, and, consequently, *if the officer be by law not removable at the will* of the President, *the rights he has acquired are protected by law, and are not resumable by the President*, They cannot be extinguished by executive authority, and he has the privilege of asserting them as if they had been derived from from any other source."

Marbury v. Madison, 1 Cranch. 167.
Dist. Atty. case, 7 Fed. Cas. 737.

"With respect to the tenure or duration of a public employment", the New York Court of Appeal say ;

"The *general rule* is that where a power of appointment is conferred in general terms and *without restriction*, the power of removal, in the discretion and at the will of the appointing power, is implied and always exists, *unless restrained and limited by some other provision of law.*" This assumes as unquestionable that the power of removal, wherever lodged, may be "restrained and limited by law."

Peo. v. Robb, 126 N. Y. 182, bot.,
citing Exp. Hennen, 13 Pet. 239.
Peo. v. Fire Com. 73 N. Y. 441.
Peo. v. Hyde, 89 *Id.* 20, bot.

"The office was created by the legislature, and they might abridge its term by express words, or *specify an event upon the happening of which it should end.*"

Peo. v. Gere, 92 N. Y. 198.
Peo. v. Hyde, 89 *Id.* 20, 21.
Peo. v. Dalton, 158 *Id.* 211, 214.

In an earlier case, the same Court, speaking of a law limiting certain removals to those made for cause, say :—

"It was intended as a substantial limitation of the general power of removal, conferred by the same sec-

tion upon the several departments of the city government, and to secure the continuance in office of the persons named until a reasonable cause other than the pleasure of the heads of the departments, or a change in the political character of the majority, should exist for their removal. The intent of the provision was to continue in the subordinate but important positions of the city government those who had proved themselves faithful and trustworthy, as well as competent to discharge the duties of their stations. . . . . .

Courts cannot assume that the Legislature intended a vain thing, and have inserted a clause apparently materially affecting the power of the departments, but which is in fact without efficacy. . . . . .

This necessarily implies that the 'cause' is to be some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. *The cause assigned should be* PERSONAL *to himself*, and implying an unfitness for the place, and such cause being assigned, if unexplained, the removal may be made. An explanation may consist either in excusing any delinquency, or apparent neglect or incapacity; that is explaining the unfavorable appearances, or disproving the charges; *that some other man is a better man than the accused, or more congenial to the appointing or removing power is not a cause* which the incumbent can explain in the sense in which that term is used, *and is no cause of removal* within the statute. . . . . .

Peo. v. Fire Com. 72 N. Y. 448–9.
Peo. v. Campbell, 82 *Id.* 250.
Andrews v. Police, 94 Me. 76.

In Peo. v. Gere, 92 N. Y. 199, the court say that removal for cause, though no particular cause is statutorily specified, "by implication impose investigation before action."

Where the statute does state causes for dismissal, that court say "*the plain implication is that they cannot be made in any other cases, or for any other causes.*"

Peo. v. Commrs. 106 N. Y. 68.

This doctrine is more emphatically stated by the courts of other states, whose constitutions are similar

to that of the United States; the decisions declaring the right of an officer to be heard before being removed "for cause", whether the statute expressly require a hearing or not. If not expressed, it is implied; as will be seen by the cases cited in the following division of this brief. It is part of our inheritance of English fair play.

Bagg's Coke, 998; 6th Rep. 185.
King v. Gaskin, 8 T. R. 209.
Ramshay, 18 Ad. & El. (N. S. 190.
Queen v. Archb. 1 El. & El. 545.
Capel v. Child, 2 Cr. & J. 574
Wms. v. Bagot, 3 B. & C. 786
Brook, 16 C. B. (N. S.) 416.

VI.

Right to hearing upon assigned cause.

A statutory limitation to removals for cause implies the necessity of a hearing; even if it did not, it *must* imply that the statutory cause must be ascertained and assigned; otherwise, the legislative intent is frustrated, and the removal intended to be for cause only becomes one made at the mere will of the executive.

The cases to which we refer below, in declaring a hearing to be a condition precedent to removal, go further than it is necessary for us to go to sustain this petition. The constitution of Michigan conferred upon the governor the power to remove for cause, without *expressly* requiring any hearing; but its Supreme Court said this was a necessary implication.

If Congress can declare the grounds upon which alone removals can be made, it is immaterial to the present question whether the restriction is constitutional or statutory.

The Michigan Court say—

"Unless it is the manifest intention of the section under consideration that the proceedings should be *ex parte* as well as summary, a removal without *charges, notice,* and an *opportunity for defense* cannot be upheld. The exercise of such a power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the state, and is entirely opposed to the genius of our institutions. . . . .

The history of judicial proceedings shows that *it has been frequently the case that officers, invested with the power of removal for specified cause, have attempted its exercise in an ex parte and summary manner, not from any wrong motive but from a misconception of the method in which such power should be exercised.*"

Dullam v. Willson, 53 Mich. 402,
citing Ramshay, 18 Ad. & El. (N. S.) 190;
William v. Bagot, 3 B. & C. 786;
Queen v. Archbishop, 1 El. & El. 545;
Capel v. Child, 2 Cr. & J. 558;
and several American cases, see *infra.*

Of the American cases largely quoted by the Michigan court, we will first notice one in Kentucky. That Court say;—

"The Secretary being removable for breach of good behavior only, *the ascertainment of the breach must precede the removal*"; which implies "the opportunity of defence and proof. *The law,* too, *prescribes the duties and tenure of the office, and thus furnishes a rule for the decision of the question involved.* . . . . And we do not doubt that every proceeding for the removal of an officer *for cause,* that is for official misbehavior, is essentially an exercise of the judicial power of the commonwealth, and would, therefore, refer itself to the judicial department of the government, *if not otherwise disposed of* by the constitution *or the laws.*"

Page v. Hardin, 8 B. Mon. 672–3.
Willard's Ap. 4 R. I. 601.

The adjutant-general of Pennsylvania held office for a specified term, "if he behaved himself well," etc.

The Court, through its Chief Justice, its other members, including Judges BLACK and WOODWARD, concurring, said ;—

" That the governor possessed the power of removal is conceded ; but the power is to be exercised *upon cause shown.*" [Ital. in original ; though the statute only said *diu bene.* E. B. S.] " It is true, the executive is made the judge ; and that his ' opinion ' or judgment is conclusive, so far as relates to the question of removal. *But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defense.*"

Com. vs. Slifer, 25 Pa. St. 28.

The opinion proceeds to state the distinction between offices held during pleasure of the appointing power and during good behavior ; that the former are, in effect, licenses while the latter imply a right to be to be heard before removal.

The Michigan Court says, after citing these cases ;— " The line of authority is not by any means exhausted," etc.

This is the entire concurring opinion of Chief-Justice COOLEY ;—

" I concur both as to the right of the respondent to be heard upon charges, and as to the power of the governor under the constitution to decide upon charges."

Dullam v. Willson, 53 Mich. 408.
People v. Lord, 9 *Id.* 227.
Mead v. Treasurer, 36 *Id.* 418-9.

Extracts have been made in this brief *(ante,* pp. 11, 12*)* from the opinion in 44 Ohio St. Reports. After saying inquiry could not be instituted as to whether or not Gov. Foraker went wrong upon the facts found, and stated of record by him, the Court add ;—

" The only question that this court *can* consider is *whether charges were preferred, of which the parties had notice,* and that he *acted upon those charges, and*

removed the respondents for the reasons stated in the charges."

State v. Hawkins, 44 Oh. 115, citing
State v. McGarry, 21 Wis. 496,

and quoting therefrom the passage reproduced *ante*, p. 12.

The statute under which Gov. Foraker acted simply said the Commissioners created by it could be removed by the governor "for official misconduct"; no mention of charges or of hearing.

An Oregon statute creating railroad commissioners provided (as stated in the before quoted extract from the Court's opinion) that the governor might remove them for cause, without explicitly saying aught of charges or hearing; but the opinion, on the page from which we quoted, said;—

"By whomsoever the power of removal *for cause* may be exercised, it must be done *upon notice* to the delinquent of *the particular charges against him*, and an *opportunity to be heard* in his defense."

Biggs v. McBride, 17 Oreg. 651.
Ham v. Boston, 142 Mass. 90.

"The salaries, duration, and existence of the offices themselves seem to be exclusively public matters, open to any modification which the representatives of the public may decide to be necessary, whenever no express restriction on the subject has been imposed in the constitution or laws."

West River v. Dix, 4 How. *548.

As the Michigan Court said, "The line of authority is by no means exhausted"; but those cited indicate the general tenor of judicial opinion.

Unless legislative restraint can be placed upon removals, effective civil-service reform is hopeless.

VII.

Ground of decision below.

RECORD, P. 10.

Though this Court, in 182 U. S. 425, has cut away the ground from under the Court of Claims' judgment, the theory of that judgment will be examined, to indicate some circumstances of which that Court took no notice.

The defense was rested below wholly upon the Parsons case, 167 U. S. 343. After noticing Mr. Shurtleff's contention, that the statute involved in Parsons' case, as construed by the courts, 'was not intended to restrict removals' while the one now in question 'was so intended' the majority opinion, "conceding that the purpose of the act was to restrict the President in the exercise of his power of removal to the causes specified therein," holds that "it does not follow that before he can act he must assign such cause as the basis of his action." (Record, 10 middle.)

This Court say such a statute, under a universally-recognized rule of construction, does require such an assignment, etc. (182 U. S. 425.)

The Court of Claims' opinion then proceeds;—

"Under the act, it is for the President alone to determine whether one of the specified causes furnishes a basis for his action. No method of procedure for that purpose, or notice thereof to the claimant, is prescribed in the statute. *Hence*, the method of ascertaining such causes is within the discretion of the President; and, *that being so*, no legal liability attached to the Government for the failure of the President to assign the particular statutory cause for his action." *(Ibid.)*

The first sentence of the above quotation would be more accurately expressed, if it said it is for the President to determine the *existence* of one of the

causes specified. The next sentence mistakes the law; for when Congress used language which, by a long continued and universal rule of construction (182 U. S. 425) implied a notice and hearing, it did thereby prescribe a method, to that extent; for "what is implied in a statute is as much a part of it as what is expressed." (U. S. v. Babbit, 1 Black, 61 and citations.) This removes the support of the concluding sentence.

In ascertaining and determining whether charges such as require or justify removal are sustained the President acts judicially, and his jurisdiction to remove is not to be inferred, argumentatively. (122 U. S. 556). What is there said of his and a court marshal's action touching the removal of a military officer is equally applicable to the case of a Merchant Appraiser.

"Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may inferred argumentatively."

Runkle v. U. S. 122 U. S. 556.

Ruden, 171 N.Y. 531; 536/7

The majority opinion then refers to the Court's third finding (Rec. 7, fol. 13) Sec. Gage's letter that "the President deems it his duty to make some changes in the personnel of the board of appraisers; with *this* in view, he directs me to request you to send to him your resignation, *to take effect at his pleasure.*" This, Mr. Shurtleff declined to do, and continued to discharge the duties of his office for three or four months. *(Id.* 8, folio 14.*)* The opinion proceeds to state that the law must assume the contemplated changes were such as it required to be made; in other words, that whatever was done must be assumed to be rightly done, though done under statutory requirements to which the proceedings do not conform.

Our contention is that this letter has just the contrary effect from that thus ascribed to it; that it proves

the purpose to be to change the composition of the board, as a board (to promote harmony of feeling or opinion in it, or to change the political majority, perhaps) and not to make a removal for any of the statutory reasons, affecting only the officer removed, and personal to him individually in connection with *his* relation to his official duties.

In the last volume of Maine reports, after noticing that the purpose of an act was to create "a tenure to be cut short only for cause," the Court adds;—

"That means cause affecting *the individual to be removed;* it does *not* mean a cause applicable to the force in gross, or collectively."

Andrews v. Police Bd. 94 Me. 76.

The opinion concludes; "The board was only authorized to remove for cause, and such removal is a judicial act, *to be made only upon notice and hearing.*" *(Id.* 76, citing 77 Me. 224 and 89 Me. 448.*)*

"*The cause assigned should be personal to himself.*" Peo v. Comrs. 72 N. Y. 449, quoted *ante*, p. 28.

This letter of January 17, 1899, besides indicating a non-statutory reason for persuading Mr. Shurtleff to relinquish his office, was an attempt to convert an office not held at the Executive's will into one that would be so held; an evasion of the Statute; since it did not contemplate the immediate separation of Mr. Shurtleff from his office and its duties, but only contingently, in the near or remote future, whenever it might suit the President's pleasure and purposes to make the resignation effective. (Rec. 7, fol. 13.)

The assumption, which Sec'y Gage's letter shows to be unfounded, that the President mentally decided upon the existence of statutory cause for Mr. Shurtleff's removal, and assigned it to himself as the ground therefor, rests upon the presumption of the proper performance of official duty—but that presumption applies, with at least equal force, to the pe-

"Don't supply place of independent and substantive fact."
Ord. v. Rose, 92 Ky. 281.
Albany v. McNamara, 107 Ky. 173.

titioner-appellant "in all proceedings, for whatever purpose originated." Best on Evi. § 346.

As stated in Judge HOWRY's brief, well-reasoned opinion (Record, 12) the majority opinion rests upon the theory that "The King can do no wrong";—a maxim which "has no such place in our institutions, and should not prevail against the presumption of innocence," etc. *(Ibid.)* Langford v. U. S. 101 U. S. 343.

The legal presumption is that Mr. Shurtleff properly performed his duties as a General Appraiser of Merchandise. If this can be balanced by the assumption that the President obeyed the statute in removing for cause, the proof is to the contrary. Mr. Shurtleff's petition denies the existence of any statutory cause (Rec. 4, fol. 7); he supports this allegation by his deposition; and the correspondence, indicating no such cause, and continuing him in office for months after his resignation was first requested, shows its non-existence.

There is no presumption stronger than that of innocence. (156 U. S. 456, 459.) Innocence is not to be predicated of those only who are arraigned in the criminal's dock.

One removable for cause would hardly have been allowed to resign; or, certainly, been requested to continue in the exercise of official functions.

As Judge WILLARD observed;

"When several independent acts are required to be performed [or occur] in order to accomplish a given result, to say that the proof of one of them shall be admitted as conclusive proof of the performance of the others, is to say, in effect, that one alone is really requisite." St. v. Platt, 2 So. Car. (N. S.) 154.

The reasoning, thus condemned by Judge WILLARD, would make the language of the twelfth section of the act of 1890, imposing a limitation upon the power of removal, mere *brutum fulmen*; keeping the word of promise to the ear, to break it to our hope.

Incidental allusion is made (Rec. 10, near bottom) to

" the concurrence of the Senate " in the appointment of somebody as 'successor' to Mr. Shurtleff, 'removed.' This 'concurrence' was not until January 17, 1900, and that appointee took the oath of office on the 26th of that month *(Id.* 9, top*)* while our petition was filed November 6, 1899, claiming salary from May 15 to November first, of that year. *(Id.* 1 ; 6, fol. 10.*)*

Nor can " the concurrence of the Senate " make that a legal and effective removal which would not be so without such concurrence ; because this is a *statutory* office, the creating statute prescribing the grounds and method of removal, which must be exclusive of any other method. Whether the deviation from what the statute prescribes is greater or less is of no conquence, so long as the departure is substantial.

Stadtler v. Detroit, 13 Mich., 346, per COOLEY, J.

To discuss this proposition any further would be to re-argue the whole issue.

VIII.

Petitioner's right to salary.

If our main proposition is maintained, that Congress has only authorized the removal of a General Appraiser upon a specified cause ascertained and assigned, it follows as a legal consequence that a dismissal without any finding of one or the other of the statutory grounds is void, and creates no vacancy ; the incumbent sought to be removed is still in office, and entitled to the appertaining salary.

" The legal right of an officer to the salary of an office depends upon his being *de jure* an officer holding, or *entitled to hold*, his office.

Belcher's case, 34 Ct. Clms. 422.
Romero case, 24 *Id.* 331.

"An appointment to fill a vacancy in an office when there is no vacancy is void."

Kimberlin v. St. 130 Ind. 121.
Sleigh v. U. S. 9 Ct. Clms. 375.
Weeks v. U. S. 21 *Id.* 124.
Stadtler v. Detroit, 13 Mich. 346.

The Indiana Court, in an earlier case, say that the governor "can make no valid appointment unless there is a vacancy in fact"—which seems an obvious proposition—adding that "the title of an incumbent cannot be affected by the *ex parte* judgment of the executive that the office is vacant."

State v. Harrison, 113 Ind. 434.
State v. McNeely, 24 *La. An. 19.*
State v. Towne, 21 *Id.* 490.
State v. Lusk, 18 Mo. 340.
Com. v. Messer, 44 Pa. 343 *mid.*
Johnston v. Wilson, 2 N. H. 203 bot.

Mr. Shurtleff was accustomed, and became entitled, to receive his salary monthly, and should now recover the instalments unpaid since May 15, 1899, to the date of filing his petition; to wit, $3,224.29. (Rec. 9, fol. 14; finding XI.

Book's case, 31 Ct. Clms. 275.
Glavey v. U. S. 182 U. S. 594.

In the Reagan case, there was some discussion in the government brief of the mere form of raising the question of the right involved, accompanied by some citations, chiefly of New York decisions or those of one or two states having similar codes; resting upon technical distinctions, as to whether an office is property, and a claim to its salary, fees or emoluments one arising *ex contractu*, etc., etc.

As these cases rest upon the exclusive nature of the Code remedy (15 Hun, 207) while the Tucker Act of March 3, 1887, authorizes the Court of Claims, in addition to contract-cases, to hear and decide any claim founded upon "any law of Congress, except for pensions" (24 St.ts. 505) and the amendment of June 27,

1898 (30 Stats. 495) evidences the purpose to leave with the Court of Claims exclusively the right to adjudicate salary cases, this topic will not be discussed here, as it was not mentioned below, nor in the government's brief filed herein, in this Court. If involved, we would like to present our views and citations.

IX.

Reply.

We wish to acknowledge the courtesy of the government counsel, in favoring us with his brief, while ours is in *fieri*.

He rests the case here, as he did below, wholly upon Parsons v. U. S. 324; the inapplicability of which has already been sufficiently discussed in this brief *(ante* p. 19*)* and in the dissenting opinion. (Rec. 11.) The majority opinion was based upon the idea that,

"Conceding that the purpose of the act was to restrict the President in the exercise of the power of removal, to the causes specified, it does not follow that before he can act he must assign such cause as the basis of his action, nor does the statute so provide." *(Id.* 10.*)*

The Reagan case refutes this position, and this construction. (182 U. S. 419.) Blake's case, at the page cited (236, bottom) expressly disclaims any purpose to do aught more than to construe the statute there in question as permitting Blake's removal, as made. The quotation from the opinion below in U. S. v. Perkins (116 U. S. 484) declining to discuss the subject of presidential power, is followed, at the top of the next page (485) with an assertion of the right to restrict removals by department heads; and the reasoning would apply to any statutory (as distinguished from constitutional) office.

X.

Conclusion.

The judgment of the Court of Claims should be reversed, and the petitioner have judgment for $3,224.29.

Peo. v. Gere, 92 N. Y. 198.
Peo. v. Fire Com., 72 *Id.* 448.
Peo. v. Commrs. 106 *Id.* 68.

Brief Recapitulation of Points and Leading Authorities.

1. President's power to remove, without consent of Senate, officers appointed with its consent whose terms the creating statute does not fix, has never been judicially decided, but the exercise of the power rests wholly upon precedent. (Pages 6 to 9.)

2. The power of Congress to fix the tenure of, and determine the causes for removal from, such offices as it may establish has never been denied, but repeatedly affirmed. (Pages 9 to 20.)

Marbury v. Madison, 1 Cr. 162.
West River v. Dix, 4 How. 548.
1 Kent's Com. (12th ed.) 310, Holmes' note.
McAllister v. U. S. 141 U. S. 175.
2 Story on Const. § 1537.
12 Ct. Clms. 215; 102 U. S. 437.
13 *Ibid.* 455; 100 *Ibid.* 680.
14 *Ibid.* 462; 103 *Ibid.* 235.
20 *Ibid.* 438; 116 *Ibid.* 485, and many cited State cases,
ex gr. St. v. Hawkins, 44 Oh. 114.
Dist. Atty. 7 Fed. Cas. 737.

3. Tenure-of-office act an example. See opinions of ablest lawyers in debate thereon. Also, other Statutes. (Pages 20 to 23.)

4. Administrative act of June 10, 1890, limits power of removal to (1) inefficiency (2) non-feasance and (3) malfeasance. (See act, *ante*, pp. 3, 4; and pages 23 to 29.)

Reagan v. U. S. 182 U. S. 419.
Biggs v. Oregon, 17 Or. 651.
Marbury v. Madison, 1 Cr. 167.

5. Removal can only be for an *assigned* cause; the act of removal assigning therefor one of those causes specified in the law. (Pages 29 to 32.)

Reagan case, 182 U. S. 419.
Dullam v. Willson, 53 Mich. 402, and citations there found.
Com. v. Slifer, 25 Pa. St. 28.
State v. Hawkins, 45 Ohio, 115.

6. Officer entitled to notice of charges, and hearing thereon, before being removed, where statute limits the power of removal to misconduct or 'cause'. (Pages 29 to 32.)

Reagan v. U. S. 182 U. S. 419, 425.
Dullam v. Willson, 53 Mich. 408, per COOLEY, Ch. Just.
Biggs v. McBride, 17 Or. 651, and other cases cited above and in brief.

7. Review of opinion below. (Pages 33 to 36.) Ross, 92 US. 281 (p. 35)

8. Petitioner, a *de jure* officer, entitled to salary; no vacancy having been created by an unauthorized attempt at removal. (Pages 37, 38.)

Belcher, 34 Ct. Clms. 422.
Romero, 24 *Id.* 331.
Kimberlin v. St. 130 Ind. 121.
St. v. McNeeley, 24 La. An. 19.
Johnston v. Wilson, 2 N. H. 203 bot.

9. Reply. P. 39.

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